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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FERN CARON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant charged with testifying falsely before a grand jury has standing under the Jury Selection and Service Act, 28 U.S.C. § 1861 et seq., to challenge the composition of the grand jury before which he testified when he was indicted by a second grand jury because the grand jury which heard his testimony was in substantial noncompliance with the Act.

2. Whether a trial court in a non-jury trial of charges involving false declarations before a grand jury is required by Rule 23(c) of the Federal Rules of Criminal Procedure to enter findings of fact establishing the defendant's knowledge of the falsity of his statements.

3. Whether a defendant who has been granted immunity for his testimony except for "perjury, giving a false statement, or otherwise failing to comply with the order," may be prosecuted for obstruction of justice based solely on his allegedly false testimony.

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UNITED STATES OF AMERICA, *Respondent*.

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Petitioner, Fern A. Caron, petitions this Court for a writ of certiorari to review the Judgment and Decision of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction against petitioner.

OPINIONS BELOW

The Opinion of the District Court denying the petitioner's pretrial motions (Appendix A, *infra*, p. 1a) is reported at 551 F.Supp. 662 (1982). The Findings of Fact and Conclusions of Law entered by the District Court were unreported (Appendix B, *infra*, p. 21a). The Opinion of the Court of Appeals (Appendix C, *infra*, p. 33a) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 10, 1983. (Appendix C, *infra*, p. 33a). Petitioner's Petition for Rehearing was denied on December 7,

1983 (Appendix D, *infra*, p. 37a). The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of 18 U.S.C. §§ 1503, 1623, 6002, 28 U.S.C. §§ 1861, 1867, and Rule 23(c) of the Federal Rules of Criminal Procedure, are set forth in Appendix E, *infra*, p. 38a.

STATEMENT OF THE CASE

The defendant, formerly a vice president of the Hartz Mountain Corporation, was subpoenaed to testify before a grand jury in Richmond, Virginia, about alleged acts of commercial bribery committed by his former employer and the attempted cover-up of these alleged practices. Although there were no allegations that Caron played any role in either the alleged acts of bribery or the alleged obstructive conduct, he was subpoenaed for the knowledge he might have had about the participation of the top management of Hartz in this conduct. (J.A. 240, 244, 250, 623).[1]

At the time he testified, the defendant was no longer with the Hartz Mountain Corporation. He had been abruptly fired five years earlier.[2] The defendant testified under a grant of use immunity, 18 U.S.C. § 6002, which

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[1] All references to J.A. are to the Joint Appendix filed with the Court of Appeals.

[2] On January 9, 1976, the president of Hartz informed Mr. Caron that "there was no future growth for [him] in the company and [his] ambitions required growth and that [his] temperment did not fit into the future plans of the company, so [he] should clear [his] desk by noon that day and leave." (J.A. 78).

provided that no testimony compelled under the order "may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The grand jury before which the defendant testified was defective in that it had been empanelled in substantial noncompliance with the Jury Selection and Service Act of 1968. *See, United States* v. *Caron*, 551 F.Supp 662, 663 (E.D. Va. 1982). The Act provides that a "defendant may move to dismiss the indictment . . . on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury." 28 U.S.C. § 1867(a). Since the grand jury which heard the testimony was the same grand jury which had previously been found to be in substantial non-compliance with the Act, any indictment returned by it would have had to have been dismissed.

In an effort to circumvent the statute, the government merely read the defendant's previously given testimony to a second grand jury which then returned the indictment. The government made no attempt to recall the witness to testify before a properly constituted grand jury. When the indictment was returned by the second grand jury, the defendant filed a timely motion to dismiss based upon the violation of the Jury Selection and Service Act. The district court denied that motion on the ground that the defendant was not within the class of persons who have standing under the Act to raise a challenge to the composition of the grand jury.

However, because the government feared that the defect in the grand jury which heard the testimony might preclude a perjury conviction, it also charged the defendant with obstruction of justice. The only means by which

the defendant allegedly obstructed justice was by giving the same false testimony underlying the perjury counts.

The testimony alleged to be false encompassed two subjects. The first related to a Hartz distributor named Frank Palecko. Palecko had engaged in certain practices from 1966 through 1969 that the prosecutor believed related to commercial bribery on behalf of Hartz. Caron was not employed at Hartz during that period of time. However, these practices resulted in a tax prosecution of Palecko in 1973. Palecko had several phone conversations with Caron about these matters that same year which were surreptiously recorded by Palecko.

The indictment charged that Caron testified falsely in the following excerpts:

Q. Now, prior to 1974 or 1975 when the 8.6 percent request from Palecko came to your attention, how much contact did you have with Frank Palecko?

A. Next to none.

Q. Did you hear anything about any income tax problems that Palecko had or indictment for income tax evasion?

A. I had heard a conversation in the office—it was not directed at me—that Frank Palecko had been indicted for tax evasion. At that time I didn't even know who Frank Palecko was; it was of no consequence.

Q. That's the first knowledge about income tax problems?

A. Yes, sir.

Q. You don't know whether today he was found guilty or innocent?

A. I do not.

Q. You don't even know if it went to trial?

A. I do not.

Q. You had no conversations with him concerning criminal charges for income tax evasion?

A. No, sir.

* * *

Q. Did anyone indicate to you that the income tax charge against Palecko had anything to do with Palecko's business relationship with Hartz Mountain?

A. I knew nothing about his tax charge, sir.

Q. So nobody told you he was being charged with income tax evasion because of some transactions that he had with Hartz?

A. No, sir.

Q. You just didn't have any knowledge of that?

A. The only knowledge that I had was that he had been indicted for tax evasion and not elaborated upon.

Q. Just conversation in the hallway so to speak?

A. It was in somebody's office that I overheard that conversation; it was not, as I said before, directed at myself.

* * *

Q. With respect to the income tax situation that you heard about, do you have any other information other than that what you gave us yesterday?

A. No, sir. The only thing I know about that is what I stated yesterday. To this day, I don't even know what the outcome of it was.

Q. You simply had no discussion directly with Mr. Palecko about the charges that were to be placed against him or were placed against him?

A. No, sir.

The essence of the defense to the charge that this testimony was false was that Caron did not recall these 1973 conversations in 1981. Palecko himself testified that he would not have remembered these conversations except for the fact that he had recently had his recollection refreshed by listening to the tapes and reading transcripts (J.A. 240). He also testified that he knew at the time of the conversations that the president of Hartz was making the decisions on the tax situation and that Caron was only carrying messages back and forth between Caron and the president. In addition, the circumstances surrounding Caron's termination by Hartz belied any motive to lie. In contrast, the government failed to present any evidence that Caron remembered these conversations when he testified.

The second subject about which Caron was alleged to have testified falsely was the practice by Hartz of providing prostitutes for its customers at an annual trade show in Chicago. This practice was in existence prior to Caron's employment by Hartz. The government had information that a Hartz employee had lied about the use of prostitutes at a deposition in a civil case upon the instruction of the president of Hartz. The government alleged that it sought Caron's testimony as the link between what the lower level employees were doing and what top management knew and authorized. Caron admitted knowledge of the use of prostitutes as well as his own limited involvement in the payments for them through expense vouchers. The government alleged, however, that he testified falsely when he denied "involvement in arrang-

ing for prostitutes to be [in Chicago] for buyers" and denied having anything "to do either with obtaining the money to pay them or arranging for them to be there."

The essence of the defense to these charges was similar to the Palecko matter, i.e., that the defendant had no knowledge at the time he testified that he had done anything which could be construed as "arranging for prostitutes to be in Chicago." The defense was supported by the fact that the defendant did acknowledge the practice and his involvement in it.

The case was tried to the district court sitting without a jury. At the conclusion of the trial, defense counsel requested the court to enter special findings of fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure. The court found the defendant guilty of testifying falsely about the Palecko matter and concluded that four responses out of twelve were willful, knowing or deliberate lies. With respect to the issue of the prostitutes, the court concluded that two of twenty-four responses were knowingly or willfully false. The court failed to enter any actual findings of fact to support the conclusion that the responses were knowingly false, an issue which was the focus of the defense.

REASONS FOR GRANTING THE WRIT

1. The Jury Selection and Service Act of 1968 initiated sweeping reforms of the selection process of federal grand and petit juries. Its purpose was to provide

> improved judicial machinery for the selection, without discrimination, of Federal grand and petit juries. Its aim is to assure all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified

> citizens will have the opportunity to be considered for jury service.

H. Rep. No. 1076, 90th Cong. 2d Sess. 3, *reprinted in* 1968 U.S. Code Cong. and Ad. News 1792.

The importance attached by Congress to this Act is reflected in the severity of the remedy for violations of the Act. Section 1867(d) provides that

> [i]f the court determines that there has been a substantial failure to comply with the provisions of this title in selecting a grand jury, the court shall . . . dismiss the indictment.

A defendant need not demonstrate prejudice to obtain a dismissal under the Act. All that is required is a substantial failure to comply with the requirements of the Act. *United States* v. *Rodriquez*, 588 F.2d 1003, 1009 (5th Cir. 1979); *United States* v. *Caron*, 551 F.Supp. 662, 663 (E.D. Va. 1982); *United States* v. *Jenison*, 485 F.Supp. 655, 659 (S.D. Fla. 1979).

Given the importance of the statute to the functioning of the judicial system and the major impact that noncompliance with the Act may have on the system, the issue of standing under the Act to challenge juries and grand juries is of grave concern. This issue has not been addressed by this Court or any other Court prior to this case. *See United States* v. *Caron*, 551 F.Supp. 662, 664 n.1 (E.D. Va. 1982).

The factual context of this case affords this Court a unique opportunity to address the issue of standing under the Act. The grand jury before which the defendant testified was indisputedly in substantial noncompliance with the Act. *See United States* v. *Caron*, 551 F.Supp. 662, 663 (E.D. Va. 1982). The government sought to avoid the statutorily mandated protections of the statute by not calling back the defendant to testify before a properly

constituted grand jury but instead by reading the testimony given before the improperly constituted grand jury to a second and properly constituted one.

The defendant challenged this maneuver by moving to dismiss the indictment. The district court denied the motion, holding that the defendant lacked standing under the Act. The court initially looked to 28 U.S.C. § 1867(a) which provides:

> In criminal cases . . . the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

The district court concluded that this language limited the defendant to a challenge to *the* grand jury that indicted him. *Id.* at 664.

The district court's decision is unsupported by the overall structure of the statute as well as the legislative history.[3] The remedy section of the Act, § 1867, must be read in conjunction with § 1861 which provides that it is the policy of the Act that

> all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

The breadth of policy concerns underlying the Act was further revealed in debates on the bill. During the debate in the House of Representatives, Representative Mathias (Maryland) stated that the existence of dis-

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[3] The district court opinion contains no citations to the actual legislative record of the statute. Instead, the court merely "inferred" the legislative intent. *See e.g.*, United States v. Caron, 551 F.Supp. 662, 665 (E.D. Va. 1982).

crimination in the jury system had caused a crisis of confidence of the public in the judicial system, and that this bill would remove that question of confidence. 114 Cong. Rec. 3992 (1968).

One of the defects causing the breakdown in confidence which the Act sought to remedy was the use of selectively empanelled blue-ribbon juries to hear cases where minorities and the economically disadvantaged were defendants. Public confidence in the integrity of the selection process is not dependent on whether the defective grand jury merely heard testimony or returned an indictment. Even if the grand jury merely heard testimony, discrimination in its selection would still create a lack of confidence in the system. A prosecutor could attempt to stock a grand jury for investigative purposes, then avoid any problem by merely presenting the evidence collected to a proper grand jury. Congress clearly did not intend to allow such maneuvering to avoid the strictures of the Act.

The defense position is further supported by the Committee reports and by the remarks of various congressmen in the House of Representatives. In its report, the Senate Judiciary Committee described § 1867 as establishing the "procedure for challenging compliance with the Act in the selection of both grand and petit *juries*. The Attorney General and the defendant in criminal cases and both parties in civil cases are allowed to challenge the selection procedures." S. Rep. No. 891, 90th Cong. 1st Sess. 35,636 (1967). (Emphasis added). During debates on the bill in the House of Representatives, Congressman Celler of New York, the chairman of the House Judiciary Committee, said ". . . § 1867 establishes the procedure for challenging compliance with the statute in the selection of both grand and petit *juries*," 114 Cong. Rec. 3991 (1968), and Rep. Machen (Maryland)

stated the ". . . policy of the United States [is that] *all litigants* in a Federal court entitled to a trial by jury shall have a right to grand and petit juries . . ." selected at random. 114 Cong. Rec. 3992 (1968) (emphasis added). Both written reports and oral statements use plural language in explaining § 1867. This strongly suggests that the District Court's emphasis in its opinion on the singular language of § 1867 is misplaced.

There is an interpretation of § 1867 which is consistent with both the literal language and the legislative history. The view adopted by the trial court is that the language of § 1867(a) refers to which juries a defendant *may* challenge. *United States* v. *Caron*, 551 F. Supp. 662, 664 (E.D. Va. 1982). However, it is more consistent with the policy of the Act to interpret that phrase as referring not to which jury *may* be challenged, but to which jury *is being* challenged by the defendant under the section. In other words, the final phrase of § 1867(a) should be interpreted as " . . . the grand or petit jury being challenged under the Act," as opposed to the indicting grand jury.

The violation of the Jury Selection and Service Act also raises the issue of whether the government was precluded from establishing an essential element of the offense. The district court acknowledged that to the extent that the violation of the statute negated "an element of the charged offense as a matter of law, defendant certainly has standing to place such matters before the Court." *United States* v. *Caron*, *supra*, at 665. The district court's pre-trial opinion examined this contention solely in light of the element that the false declaration be made "under oath." However, at the close of the government's case, the defendant filed a written motion for a judgment of acquittal in which he contended that there

was another element of the offenses which was affected by the violation of the Jury Selection and Service Act, i.e., that the grand jury which heard the testimony be competent, duly empanelled and sworn. The defendant further argued that the defect in the composition of grand jury before which he testified precluded the establishment of these offenses. *See United States* v. *Reinecke*, 524 F.2d 435 (D.C. Cir. 1975); *United States* v. *Fein*, 370 F.Supp. 466 (E.D.N.Y. 1974), *affirmed*, 504 F.2d 1170 (2d Cir. 1974). The district court's pre-trial opinion never addressed the merits of this argument and the Court of Appeals relied solely on the district court's pre-trial opinion in deciding the appeal. Therefore, the Court of Appeals, effectively, deprived the defendant of his right to appeal the district court's ruling on the issue. *See Coppedge* v. *United States*, 369 U.S. 438 (1962).

This Court should grant the petition for a writ of certiorari in order to clarify a statute of central importance to the judicial system and to afford the defendant his right of appeal.

2. Rule 23(c) of the Federal Rules of Criminal Procedure mandates that upon request the trial court in a non-jury trial prepare findings of facts supporting its conclusions in the case. This requirement is an important element of fairness and justice.

> The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an important element of fairness to the accused. As a distinguished trial judge has observed, "The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice." Moreover, the trial court's statement is an important element of judicial administration, because . . . "an appellate court must be able to ascertain the grounds for [a

> lower court's decision] in order to fulfill its responsibility of review."

United States v. *Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973). *See United States* v. *Johnson*, 496 F.2d 1131, 1138 n. 7 (5th Cir. 1974).

Despite the importance of the rule in the administration of justice, a conflict exists between the Fifth Circuit and the Fourth Circuit over the scope of the requirements of the rule.

In *United States* v. *Pinner*, 561 F.2d 1203 (5th Cir. 1977), the defendant was convicted in a non-jury trial of willfully failing to file his employer's quarterly federal tax returns. The court entered findings of fact pursuant to the defendant's request. The only finding of fact relating to the defendant's intent was that "[t]he defendant's failure to make a timely Income Tax Return for each of the taxable periods in question was a knowing and willful failure." *Id.* at 1204 n. 2. This general conclusion was held to be an inadequate response to a request for special findings of fact.

> In this case, the trial judge did not make either a specific written finding or a comment from the bench clearly announcing his findings as to appellant's credibility during his interviews with the IRS. This finding is especially important because appellant's belief that he did not have to file if he was not able to pay the tax owed is a recognized legal defense against the element of "willfulness."

Id. at 1206.

One of the essential elements of a prosecution for false declarations before a grand jury (18 U.S.C. § 1623) is that the defendant made the false statement with knowledge of its falsity. *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980); *United States* v. *Kelly*, 540 F.2d 990,

994 (9th Cir. 1976); *United States* v. *Chapin*, 515 F.2d 1274, 1280 (D.C. Cir. 1975). This is also an element of the obstruction of justice counts under the facts of this case where the only manner in which the defendant allegedly obstructed justice was by "knowingly and willfully testifying falsely before a grand jury of the United States District Court." (Indictment, Counts Three and Four).

The findings entered by the district court with respect to these elements were the same as those entered by the court in *Pinner*. The district court merely concluded that the answers were willfully false. It made no finding as to why it found them to be willfully false. For example, the Court noted that when asked whether he had any conversations with Palecko concerning criminal charges for income tax evasion, the defendant answered "no, sir." The Court specifically found that the defendant had telephone contact with Palecko six or eight times in reference to Palecko's tax problems. Therefore, the Court found the answer was false. However, the Court made no findings of fact to support its conclusion that the defendant knew his response was false when he testified. The findings of the court with respect to other questions were similarly unenlightening:

> "That, in the Court's view, was wrong, deliberate, and willful."
>
> "That response was false and Mr. Caron made it deliberately, willfully and with intent to mislead."

The Court of Appeals' opinion is proof of the conclusory nature of the findings. Despite recounting the facts which it held established the falsity of the defendants' answers, the Court's opinion is devoid of any reference to any facts to support the conclusion that the defendant knew he was

testifying falsely. The only reference the Court of Appeals made to this essential element was that

> [t]o the extent that Caron's grand jury testimony was inconsistent with other testimony submitted at the trial, the district judge found that the defendant's relevant answers were intentionally and knowingly false.

The defendant stands convicted of willfully and knowingly testifying falsely. He has not been informed of the basis for the conclusion that his answers were knowingly false by either the district court or the Court of Appeals. Althougth the Fourth Circuit has found a conclusory finding to be an adequate response to a request under Rule 23(c), the Fifth Circuit requires substantially more. A resolution of these differences by this Court is mandated.

3. The "use" immunity statute, 18 U.S.C. § 6002, precludes the use of testimony compelled by the statute in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." The government was, therefore, permitted to use the defendant's immunized testimony in a prosecution for false declarations before a grand jury. However, the government took the prosecution one step further and also used the defendant's compelled testimony in a prosecution for obstruction of justice. This use of the testimony violates the explicit language of the statute.

> It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention a statute should be interpreted according to its plain language.

United States v. *Apfelbaum*, 445 U.S. 115, 121 (1980).

In *Apfelbaum*, the Court examined the scope of the use immunity statute and observed that the grant of use immunity

> prevents the use and derivative use of his testimony with respect to any subsequent criminal case except prosecutions for perjury and false swearing offenses in exchange for his compelled testimony. The Government has kept its part of the bargain; this is a perjury prosecution and not any other kind of criminal prosecution."

Id. at 130.

The government failed to keep its part of the bargain in this case. It charged the defendant with an offense outside the statutory exception.

The District Court relied on two Supreme Court cases in an effort to avoid the literal language of the statute. The factual basis for the theory upon which both cases were decided distinguishes them from this case.

The first case was *Glickstein* v. *United States*, 222 U.S. 139 (1911), where the defendant had given false testimony in a bankruptcy proceeding under an immunity provision of the Bankruptcy Act of 1898 which provided that no testimony given by a witness may be offered in evidence against him in any criminal proceeding whatsoever. There was, thus, no way to ensure that the testimony given was truthful. Congress had passed a statute which compelled testimony but did not provide for prosecution for false testimony. A literal interpretation of the statute would have frustrated its obvious object and intent.

> It is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given

> with impunity, in the absence of the most express and specific command to that effect.

Id. at 143. Therefore, the Court concluded that a perjury prosecution based on testimony compelled under that statute was permissible.

No such drastic circumstances are presented by this case. The statutory language is similarly unambiguous but permits a prosecution for perjury. The government has acknowledged that the same allegedly false testimony underlies both the perjury and obstruction counts. Thus, the necessity upon which the Court's reasoning was based in *Glickstein* was not present in this case. The government was limited by statute to the perjury counts.

The case of *United States* v. *Bryan*, 339 U.S. 323 (1950) is distinguishable for exactly the same reasons. The defendant had been subpoenaed to produce records before the Committee on Un-American Activities of the House of Representatives. She made a statement at the hearing in response to the subpoena that she was refusing to produce them. She was subsequently prosecuted for failing to produce the records. At trial, her testimony concerning her refusal was admitted into evidence. The defendant contended that this use of her testimony violated an immunity statute which provided that "no testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

The Court observed that the defendant's testimony came within the literal language of the immunity statute. It concluded, however, that to immunize the testimony "would subvert the congressional purpose in its passage." *Id.* at 335. No prosecution for perjury was possible because the testimony at issue was truthful. Thus, the

Court was once again faced with the necessity of construing a statute in order to avoid frustrating the congressional intent.

The crucial element of necessity is noticeably lacking in this case. The government's apparent desire to pyramid the charges against the defendant does not rise to the requisite level of "necessity" presented by *Glickstein* and *Bryan*. Untruthful testimony may properly be the subject of a prosecution for perjury. There is, thus, no need to look beyond the literal language of the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT.
E.D. VIRGINIA.
RICHMOND DIVISION.

Dec. 2, 1982

Crim. A. No. 82-00087-01.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

Fern A. CARON, *Defendant*.

Defendant was charged with perjury and obstruction of justice. On motion for dismissal, the District Court, Merhige, J., held that: (1) defendant lacked standing under the Jury Selection and Service Act to challenge composition of grand jury which took no action against him; (2) Government's burden on obstruction of justice charge was not satisfied merely by proof that defendant rendered false testimony but, rather, Government had to further demonstrate that testimony thwarted or impeded grand jury's investigation; (3) false declarations alleged in counts one and two of indictment could form basis for obstruction of justice charges; and (4) since alleged obstruction of justice, if it occurred, had to have taken place following grant of immunity, grant of immunity did not bar use of immunized testimony against defendant on obstruction of justice counts.

Motion denied.

Justin W. Williams, U.S. Atty., Alexandria, Va., N. George Metcalf, Asst. U.S. Atty., Richmond, Va., for plaintiff.

Plato Cacheris, Larry S. Gondelman, Hundley & Cacheris, P.C., Washington, D.C., for defendant.

MEMORANDUM

MERHIGE, District Judge.

Defendant is charged in a four-count indictment with perjury and obstruction of justice. In connection therewith, he has filed numerous motions seeking dismissal. Having heard the arguments of counsel for the government and the defendant, the Court will address the motions *seriatin*.

I. *Motion To Dismiss The Indictment On The Ground Of Defective Grand Jury*

In support of his motion to dismiss the indictment, defendant contends the grand jury before which he allegedly perjured himself was "incompetent," and, accordingly, any false testimony given to such grand jury could not constitute perjury. For essentially the same reason, defendant asserts his actions could not constitute obstruction of justice.

Defendant's contention that the grand jury before which he testified, though not that by which he was indicted, was incompetent is purportedly founded upon the ruling of the Court in *United States* v. *Branscome*, 529 F.Supp. 556 (E.D.Va.), *aff'd*, 682 F.2d 484 (4th Cir.1982), that an indictment returned by that grand jury had to be dismissed due to a substantial failure to comply with the Jury Selection and Service Act of 1968 ("the Act") in the empanelling of the grand jury.

As defendant reads the *Branscome* opinion, "the defect in the selection of the grand jury rendered it a nullity. In essence, it had no authority to do anything." Defendant concludes therefrom that any false testimony given before a grand jury so tainted could not amount to perjury.

Challenges to the composition of a grand jury may be asserted under the Act or on constitutional grounds. In the case at bar, defendant apparently raises his challenge only under the statute. Noting the uniqueness and substantiality of the question presented by these facts, however, the Court has also considered the possible ramifications of the grand jury taint from a constitutional perspective.

The determination as to whether the Act requires dismissal of the instant indictment turns entirely on the question whether defendant has standing under the Act to challenge the grand jury before which he testified. The *Branscome* decision conclusively established that the grand jury in question was empanelled in substantial non-compliance with the Act, 529 F.Supp. at 564. Accordingly, if defendant is within the narrow class of litigants contemplated by the Act, the indictment must be dismissed, for defendant need not demonstrate prejudice in order to prevail on his challenge; rather, a showing of a substantial failure to comply with the requirements of the Act is all that is necessary. *See United States* v. *Rodriquez*, 588 F.2d 1003, 1009 (5th Cir.1979); *United States* v. *Jenison*, 485 F.Supp. 655, 659 (S.D.Fla.1979).

In determining whether defendant has standing to challenge the method by which the grand jury was empanelled, it is to the language of the relevant statute, 28 U.S.C. § 1867(a), that the Court first refers:[1]

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered

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[1] The Court's research discloses that the precise question whether a criminal defendant has standing under 28 U.S.C. § 1867(a) to challenge the composition of a grand jury which did not indict the defendant is one of first impression. The only judicial comment the Court has found regarding this question generally appears in the opinion of the District Court in *In re Archuleta*, 432 F.Supp. 583 (S.D.N.Y. 1977):

> The defendant or Attorney General in any criminal case may challenge the array of the grand jury *which brought the indictment*
>
> . . . .

Id. at 592 (emphasis added). Although this Court reaches the same conclusion, *Archuleta* cannot be viewed as authoritative on this point for several reasons. For one thing, the statement quoted just above is clearly dictum. Also, although this statement appeared in a discussion of both the constitutional and statutory bases for challenges to grand juries, it does not appear the Court was, in this context, interpreting the language of § 1867(a).

> or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

Defendant argues that the language of the statute does not strictly limit the statutory remedy to challenges by a defendant against the indicting grand jury. Defendant further contends the policy declaration of the Act as set forth in 28 U.S.C. § 1861 indicates a broad congressional intent to afford "all litigants" a randomly selected jury. The only qualification on this entitlement, defendant asserts, is that the litigant be one entitled to trial by jury. From all of this, defendant concludes he, as a litigant is entitled to trial by jury, has standing to challenge the composition of a grand jury before which he appeared as a witness, notwithstanding the fact that the instant indictment was returned against him by another grand jury, the composition of which he does not challenge. Finally, defendant contends "[t]he plain language of sections 1861 and 1867 permits a defendant to challenge the composition of any grand jury related to his case."

As an initial matter, the Court cannot agree that the language of §§ 1861 and 1867 affords a defendant the right to challenge "any grand jury related to his case." To the contrary, in the Court's view, the common-sense impression engendered by those sections is that a criminal defendant is entitled to challenge the composition of the grand jury which returned the indictment. While § 1867(a) is not endowed with an overabundance of clarity, the language suggests the availability of a challenge to the composition of a grand jury is limited to criminal defendants who have been indicted by that grand jury. This reading derives from that portion of the statute which states: "[T]he defendant may move to dismiss the indictment . . . on the ground of substantial failure to comply with the provisions of this title in selecting *the* grand or petit jury." [Emphasis added.] In eschewing the use of the terms "*a* grand

jury" or "*any* grand jury" in favor of "*the* grand jury," Congress apparently intended to limit grand jury challenges to those made by a "criminal defendant" to "the grand jury" that indicted such defendant. This conclusion is, of course, directly contrary to defendant's unsupported assertion that he has standing under § 1867 to challenge "any grand jury related to this case"; the Court, however, can discern no support for defendant's contention in the language or purpose of the statute, or in the case law.[2]

The policy reasons supporting the Court's reading of the statute are evident. It may reasonably be inferred that Congress, in enacting the Act, was attempting to prevent systematic exclusion of racial, ethnic, or religious minorities from jury service by constructing a statutory scheme designed to ensure random selection of juries from a fair cross section of the community. *See United States* v. *Maskeny*, 609 F.2d 183, 191 (5th Cir.), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); *United States* v. *Manbeck*, 514 F.Supp. 141, 144 (D.S.C.1981). The Act is rather clearly designed to accommodate the equal protection concerns presented as these minority groups have been systematically underrepresented or excluded from grand and petit juries. These concerns overlap, of course, with the principle of being judged by one's peers. This principle and its attendant equal protection ramifications do not come into play where the jury being challenged neither indicted nor tried the defendant making the challenge. Accord-

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[2] The cases cited by defendant do not support the proposition asserted. Specifically, *United States* v. *Flood*, 394 F.2d 139, 141 (2d Cir. 1968), merely reaffirms the established principle that a grand jury witness "cannot impede collection of evidence by the grand jury even though the issues he seeks to raise could be later litigated—perhaps with success—by an indicted defendant." The opinion in *Flood* does not discuss the question whether a grand jury witness has standing under the Act to challenge the composition of a grand jury which did not indict him. Indeed, the Act was not in effect at the time of the *Flood* decision.

ingly, the Court concludes neither the language nor the purposes of the Act require that a defendant be found to have standing to challenge the composition of a grand jury which neither indicted him nor took any other action against him.[4]

Having concluded that the defendant lacks standing under the Act to challenge the method by which the grand jury was selected, the Court turns to the question of defendant's standing to raise irregularities in the empanelling of the grand jury on constitutional grounds. Because defendant stands indicted of a criminal offense, considerations of due process dictate that he be afforded the opportunity to raise all defenses not waived. To the extent defendant's challenge to the composition of the grand jury could reveal a violation of his constitutional rights or could negate an element of the charged offense as a matter of law, defendant certainly has standing to place such matters before the Court. See, e.g., In re Archuleta, 432 F.Supp. 583, 589 (S.D.N.Y.), *aff'd*, 561 F.2d 1059 (2d Cir. 1977). The Court discerns no constitutional violations in this case; thus, the Court must examine the substance of defendant's contentions to determine whether they would negate an element of the offense.

Defendant's fundamental premise, often repeated, that the grand jury in question was "incompetent" and a "nullity" is simply incorrect, and no support for this contention is intimated in the opinions of the District and Circuit Courts in *United States* v. *Branscome*, 529 F.Supp. 556 (E.D. Va.), *aff'd*, 682 F.2d 484 (4th Cir.1982). Those courts merely concluded the grand jury had been selected in substantial noncompliance with the Act and, under the terms of the Act, the indictment was required to be dismissed upon motion timely made. This, of course, does not mean the grand jury was a

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[4] The decisional law makes clear, and defendant apparently concedes, a witness lacks standing under the statute to challenge the grand jury. *See, e.g., In re Archuleta*, 432 F.Supp. 583 (S.D.N.Y.), *aff'd*, 561 F.2d 1059 (2d Cir. 1977).

"nullity" having "no authority to do anything," as defendant urges. Indeed, the existence of a timeliness requirement indicates any technical defects under the Act in the jury selection process are waivable, as the court held in *United States* v. *Kennedy*, 548 F.2d 608 (5th Cir. 1977), *cert. denied*, 434 U.S. 865, 98 S.Ct. 199, 54 L.Ed.2d 140 (1978) (conviction affirmed where defendant failed to meet strict formal prerequisites for challenging the composition of the jury under the Act). If a defendant indicted by the tainted grand jury can be validly convicted after waiving his challenge, it cannot seriously be contended that the grand jury was a "nullity."

The question thus becomes whether the grand jury taint found to exist in *Branscome* provides a basis for dismissal of the instant indictment. In reviewing the elements of the offense with which defendant is charged, it appears the only element that arguably could be affected by the grand jury taint is the requirement that the allegedly false declaration be made "*under oath*." 18 U.S.C. § 1623(a). Were defendant correct in his assertion that the grand jury was a nullity, a real question would exist as to whether defendant's grand jury oath had been vitiated.[4] As heretofore noted by the Court, however, the grand jury in question was not a nullity, and the Court cannot say as a matter of law that defendant was not "under oath."

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[4] The Court has found no federal cases examining the precise question here presented. In a closely analogous context arising in the courts of the State of New York, however, the court stated the following:

> Although defendant *may* have successfully contested an *indictment* returned against him by the 1973 grand jury, the alleged illegal composition of that body in no manner affected its right lawfully to administer an oath to him or receive testimony from him nor did its actions in any manner prejudice defendant [citation omitted] nor deprive him of his constitutional rights.

People v. *Skibinski*, 55 A.D.2d 48, 389 N.Y.S.2d 693, 695 (1976) (emphasis in original).

Defendant's assertion that the grand jury was a nullity is further undermined in principle by the Supreme Court'd decision in *United States* v. *Williams*, 341 U.S. 58, 71 S.Ct. 595, 95 L.Ed. 747 (1951). In *Williams*, the defendants allegedly perjured themselves in a proceeding over which the District Court later found it had no jurisdiction. On the basis of this jurisdictional finding, the District Court concluded the indictments for perjury had to be dismissed. The Supreme Court reversed, stating:

> Here, however, we have a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury. We have a court empowered to take cognizance of the crime of perjury and decide the issues under that statute. The effect of the alleged false testimony could not result in a miscarriage of justice in this case but the federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administrtion of justice by false testimony. That statute has led federal courts to uphold charges of perjury despite arguments that the federal court at the trial affected by the perjury could not confer a valid judgment due to lack of diversity jurisdiction, or due to the unconstitutionality of the statute out of which the perjury proceedings arose.
>
> Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not consititute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

Id., 341 U.S. at 68-69, 71 S.Ct. at 600-601 (footnotes omitted).

The situation in *Williams* parallels that in the instant matter in certain pertinent respects. Irrespective of the fact that the *Branscome* grand jury was found to be tainted subsequent to defendant's rendering of the alleged false declarations, at the time defendant testified, the grand jury was in the process of administering justice, a constituent part of which was the

administering of an oath to the defendant. The fact that the grand jury was later found to have been constituted in violation of the Act does not vitiate the oath or negate the alleged falseness of the testimony. To conclude otherwise would be in contravention of the plain language of *Williams* as set forth above. It follows then that it is specious to contend here that the taint of the *Branscome* grand jury voids defendant's testimony before that grand jury.

Defendant similarly contends his conduct before the grand jury could not constitute obstruction of justice because an "incompetent" grand jury could not have been "duly empanelled" or "administering justice." The Court's conclusion above that the grand jury was not incompetent or a nullity disposes of the contention.

In summary, having concluded defendant lacks standing under the Act to challenge the composition of a grand jury which took no action against him, finding the grand jury in question was not a nullity, and discerning no violations of defendant's constitutional rights in the selection of the grand jury, the Court concludes defendant's Motion to Dismiss the Indictment on the aforestated grounds must be denied.

II. *Motion To Dismiss The Indictment For Failure To State An Offense*

A. Defendant also moves to dismiss counts three and four of the indictment (the obstruction of justice charges) on two grounds. First, because he was testifying under a grant of "use" immunity, defendant relies on the language of 18 U.S.C. § 6002 for the proposition that testimony given under such a grant of immunity can be used only in a prosecution "for perjury, giving a false statement, or otherwise failing to comply with the order." In other words, the statute specifies the offenses in whose prosecution the (allegedly false, immunized) testimony may be used, and obstruction of justice is not among them. Second, defendant contends the mere rendering of false testimony does not also constitute obstruction of justice.

In response to the first claim, the government asserts the language of 18 U.S.C. § 6002 does not preclude prosecuting the defendant for the obstruction of justice embodied in his alleged making of false declarations. To rebut the second claim, the government cites case authority as squarely holding that the giving of perjurious statements may form the basis for an obstruction of justice prosecution.

The Court addresses the second contention first. The two circuit courts of appeals that have directly addressed the question whether the rendering of false testimony[5] can also constitute obstruction of justice, Fifth and Sixth Circuit, have reached facially contrary conclusions.[6] These differing results apparently stem from different perceptions of the purpose and scope of the obstruction of justice statute in question, 18 U.S.C. § 1503. As noted by the Fifth Circuit Court of Appeals in *United States* v. *Griffin*, 589 F.2d 200 (5th Cir. 1979), § 1503 is composed of two parts: a specific enumeration of types of

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[5] The Court has used the terms "false declarations," "false testimony," "false swearing," and "perjury" interchangeably throughout this memorandum. The Court is, of course aware that these offenses may be prosecuted under different statutes, *compare* 18 U.S.C. § 1621 *with* 18 U.S.C. § 1623(c)(2); however, the distinctions among the various statutes do not affect the principles here in issue.

[6] The government asserts the Fifth Circuit and the Second Circuit are in agreement on this point. In *United States* v. *Griffin*, 589 F.2d 200 (5th Cir.1979), the Court did to some extent rely on *United States* v. *Cohn*, 452 F.2d 881 (2d Cir.1971), *cert. denied*, 405 U.S. 975, 92 S.Ct. 1196, 31 L.Ed.2d 249 (1972). However, the indictment in *Griffin* alleged only that the defendant gave false testimony, whereas in *Cohn*, the indictment additionally charged the defendant with giving evasive testimony, which more clearly obstructs a grand jury's investigation than does false testimony. Nevertheless, the analysis employed in *Cohn*, *see* 452 F.2d at 883-84, does lend support to the approach taken in *Griffin*.

proscribed activity an an "omnibus" clause describing the activity in general terms.

> The first portion of the statute prohibits the influencing, intimidation, or impeding of any witness, juror, or court official. The concluding clause of the statute penalizes anyone who "corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice."

589 F.2d at 202-03. Relying on its previous decision in *United States* v. *Howard*, 569 F.2d 1331 (5th Cir.1978), the Court rejected the argument that the general language of the concluding clause of the statute has no broader reach than the more specific language of the first portion. The Court reasoned, as it had in *Howard*, that the restrictive reading of the statute urged by the apellant would render the omnibus clause, that is, the concluding clause, superfluous. *Griffin*, 589 F.2d at 203; *accord*, *United States* v. *Walasek*, 527 F.2d 676, 679 (3d Cir.1975). The *Griffin* court thus concluded the most natural construction of the omnibus clause is that it prohbiits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute. *Griffin*, 589 F.2d at 203.

The *Griffin* court turned to the question whether perjury can constitute "an offense against the effective administration of justice" within the meaning of the omnibus clause of § 1503. *Id.* The Court first recalled its decision in *United States* v. *Partin*, 652 F.2d 621, 631 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), holding that one who conspired to induce a witness to testify falsely could be prosecuted under the omnibus clause of § 1503 because the object of such conspiracy was to obstruct justice. The *Griffin* court then reviewed its decision in *United States* v. *Howard* that the use of threats to prevent a grand jury witness from testifying has the result of destroying evidence, and, thus, can constitute obstruction of justice under § 1503. 569 F.2d at 1334. Simply stated then, the Fifth Circuit's conclusion is that "the omnibus clause aims at all conduct that results in an obstruction of justice." *United States* v. *Griffin*, 589 F.2d at 203; *United States* v. *Howard*, 569 F.2d at 1335; *United States* v. *Partin*,

552 F.2d at 531. Having so concluded, the *Griffin* court found that the giving of false testimony could likewise amount to obstruction of justice:

> Similarly, using threats or bribes to prevent a grand jury witness from testifying truthfully has the result of concealing and altering the nature of evidence. If such conduct constitutes an obstruction of the administration of justice, as we held in *Partin*, then so does testifying falsely; the result in either case is the same.

589 F.2d at 203 (footnote omitted). The Court further noted: "The perjurious witnesses can bring about a miscarriage of justice imperiling the innocent or delaying the punishment of the guilty. Thus, had Griffin's testimony been merely false, it might well have come under the terms of the omnibus clause of § 1503, nonetheless." *Id.* at 204. Finally, although the indictment in the *Griffin* case involved allegations that the defendant gave false testimony before a grand jury, the Court found any distinction between "false" testimony and "evasive" testimony immaterial to the question whether the giving of testimony of either description could constitute obstruction of justice under § 1503. "In either event," the Court stated, "the government must, and in this case, did, charge in the indictment and prove at trial that the testimony had the effect of impeding justice." 589 F.2d at 204.

Having concluded perjury may be the type of conduct proscribed by the obstruction of justice statute, 18 U.S.C. § 1503, the *Griffin* court addressed the narrower question whether perjury alone may also constitute obstruction of justice.

> Undeniably, the Supreme Court found that perjury alone does not have a necessarily inherent obstructive effect on the administration of justice. The Court made clear, however, that false testimony can amount to contemptuous conduct when added to the element of perjury there is the " 'further element of obstruction to the Court in the performance of its duty'." *In re Michael*, 326 U.S. [224] at 228, 66 S.Ct. [78] at 80 [90 L.Ed.30] [(1945)],

> *quoting Ex parte Hudgings*, 249 U.S. [378,] 383, 39 S.Ct. 337 [63 L.Ed. 656] [(1919)].

589 F.2d at 205. In *Griffin*, the court found this "additional element" present, concluding

> Griffin's testimony did not merely require the grand jury to ascertain the truth by resolving contradictory evidence; his denial of knowledge had the effect of closing off avenues of inquiry entirely.

Id. In summary then, the Fifth Circuit has concluded the omnibus clause of § 1503 is not restricted in scope by the specific language of the first portion of that statute; perjury may, under certain circumstances, be the type of conduct that constitutes an interference with the due administration of justice; and where the government pleads and proves that perjury had the effect of impeding justice, the rendering of the perjurious testimony may form the basis for a prosecution for obstruction of justice under § 1503.

Defendant cites *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969), as authority contrary to *United States* v. *Griffin*. In *Essex*, the defendant was charged with obstruction of justice under 18 U.S.C. § 1503 as the result of her filing with the Court a false affidavit in support of a defendant's motion for a new trial in an unrelated criminal case. Having reviewed the historical antecedents of § 1503, the *Essex* court concluded, in essence, that the omnibus clause did not broaden the specific enumeration of conduct constituting obstruction of justice as set forth in the first portion of the statute. 407 F.2d at 218 ("The general clause at its end, moreover, must be read to embrace only acts similar to those mentioned in the preceding specific language."). Further, emphasizing that § 1503 is in the nature of a contempt statute, the Court viewed the question before it as whether the act of filing a false affidavit can constitute a contemptuous act within the meaning of the obstruction of justice statute, and concluded it could not.

Relying on *In re Michael* and *Ex parte Hudgings*, the *Essex* court stated that "perjury alone lacks the element of obstruc-

ton which is the essence of contempt." 407 F.2d at 218. More specifically, the Court concluded:

> Since the statute before us, 18 U.S.C. § 1503, is also a contempt statute the obstructive element, that is, impeding the court in the conduct of its business or endeavoring to do so beyond the mere rendering of false testimony, must, we believe, be alleged and proved before conviction can be had under it.

Id. Linking this conclusion to its narrow reading of the scope of § 1503, the Court noted the defendant was "charged with perjury and nothing more; although she may have perjured herself . . . she did not endeavor to influence or interfere with 'officer[s], juror[s] or witness[es]' within the meaning of 18 U.S.C. § 1503." *Id.* Accordingly, the defendant's conviction under that statute was reversed.

Although the parties have characterized the holdings in *Griffin* and *Essex* as contrary to one another, and, indeed, the *Griffin* court noted the distinctions in the respective analyses, *See* 589 F.2d at 203 n.2, 205 n.6, the fundamental legal principles expressed in those cases do not appear necessarily irreconcilable. Both opinions conclude proof of the mere rendering of false testimony will not support a conviction under § 1503; the government must plead and prove the additional element of an impediment to the administration of justice. The cases do clearly diverge, however, on the scope of § 1503 and specifically on the effect to be given the omnibus clause thereof. Although it is, of course, well established that criminal statutes are to be narrowly construed and found to have determinate limits, it is equally fundamental that effect is to be given to all portions of a statute not irreconcilable, as Congress is presumed not to have inserted meaningless language into a statute. Accordingly, this Court concludes the omnibus clause of § 1503 must be read to proscribe conduct that impedes the administration of justice beyond those acts specifically enumerated in the first portion of the statute.

The *Essex* opinion may fairly be read to require the government to plead and prove that the defendant engaged in conduct

additional to the giving of false testimony in order to show an offense under § 1503. The *Griffin* opinion, on the other hand, may be said to require only that the government plead and prove that the allegedly false testimony had the effect of impeding justice. To the extent the foregoing represents the true implications of the respective holdings, they are, of course, in conflict.

This Court discerns no requirement in the languge of § 1503 that the government, having pleaded the facts tending to show the commission of an act that obstructed justice, must allege the commission of an additional act to state an offense under § 1503. This is, in effect, what the *Essex* opinion may be read to require. In the instant case, the indictment alleges defendant willfully endeavored to impede the due administrtion of justice, and sets forth the factual basis for this allegation, the same being that defendant falsely testified concerning a matter under investigation by the grand jury. The plain language of § 1503 requires no more by way of pleading.

Having concluded the indictment is technically sufficient to state an offense under § 1503, the question becomes whether the substance of the indictment cannot state an offense as a matter of law by reason of the fact that perjury standing alone does not necessarily constitute obstruction of justice. In the Court's view, the answer is to be found in the Supreme Court's opinion in *In re Michael*, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945). There, the Court stated:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that perjury alone does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury

> under the general law the further element of obstruction to the Court in the performance of its duty." *Ex parte Hudgings, supra*, 249 U.S. at 382, 383, 384, 39 S.Ct. at 339, 340.

326 U.S. at 227-28, 66 S.Ct. at 80. Contrary to the view apparently expressed by the *Essex* court, this Court discerns no intimation in the foregoing language that a defendant accused of giving false testimony must also be accused of committing some additional act to be subject to indictment for obstruction of justice. The *Michael* opinion appears to state two relevant principles: (1) the giving of false testimony does not necessarily constitute obstruction of justice; and (2) the giving of false testimony can amount to obstruction of justice where it is shown the rendering of the false testimony has impeded the administration of justice. In other words, the government's burden on this obstruction of justice charge is not satisfied merely upon proof that defendant rendered false testimony; rather, the government must further demonstrate the rendering of such testimony thwarted or impeded the grand jury's investigation. This is what is meant by "the added element of obstruction." The Court, therefore, concludes the false declarations alleged in counts one and two of the indictment can form the basis for the obstruction of justice charges in counts three and four. Further, the Court having concluded counts three and four state an offense under 18 U.S.C. § 1503, defendant's motion to dismiss on that basis will be denied.

B. Defendant also argues the language of 18 U.S.C. § 6002 proscribes the use of his immunized testimony in this prosecution for obstruction of justice. Section 6002 provides in pertinent part:

> [N]o testimony or other information compelled under the [immunity] order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Defendant contends the statute is unequivocal in limiting the use of testimony immunized under § 6002 to prosecutions for

perjury and the giving of false statements. This being so, defendant does not attack the perjury counts of the indictment (one and two) on this basis, but contends the obstruction of justice counts (three and four) thereof must be dismissed.

Defendant relies on the recent decision of the United States Supreme Court in *United States* v. *Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980), in support of his position.[7] Specifically, defendant notes *Apfelbaum* recites the well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain lanugage. 445 U.S. at 121, 100 S.Ct. at 952. Defendant notes the statute does not use the language "obstruction of justice." Defendant further quotes the Court's references to the "perjury and false-declarations exception,"[8] *id.* at 130, 100 S.Ct. at 957, for the

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[7] As defendant apparently acknowledges, the question before the Court in *Apfelbaum* was whether Congress, in enacting § 6002, intended to limit the use of immunized testimony in a subsequent criminal prosecution to permit only the use of a witness's allegedly false statements. The Court did not attempt to delineate in what types of prosecutions immunized testimony could be used, and the statements quoted *infra* by defendant from the *Apfelbaum* opinion are clearly dicta as they relate to this issue.

[8] Assuming this statement and another similar to it in *Apfelbaum* to be relevant to the instant case, the government argues the Supreme Court was using the term "false declarations" in its generic sense, and was not referring only to the false declarations statute, 18 U.S.C. § 1623. The government contends "false declarations," generically, is broad enough to embody the obstructions of justice alleged here. Defendant disputes this generic view of the statute, but asserts that even if it is read in this fashion, there simply is no logical relationship between false swearing and obstruction of justice, and, thus, obstruction of justice cannot be considered a false swearing offense. Given the conduct that allegedly forms part of the basis for the obstruction of justice charges here, the Court doubts defendant's latter contention is true. The Court's conclusions below concerning the doubtful application of *Apfelbaum* here and the retrospective protection afforded by the immunity statute render a resolution of these questions unnecessary.

proposition that the Court did not intend for the exception to extend to obstruction of justice. From these statements, defendant concludes his immunized testimony cannot be used in a prosecution for obstruction of justice.[9]

Again, the precise question here presented appears to be one of first impression. In this instance, however, case authority on analogous propositions uniformly indicates the statutory construction urged by defendant is not the correct one. As noted by the government, and discussed in detail in *United States* v. *Tramunti*, 500 F.2d 1334, 1342-46 (2d Cir.1974), the decisions of the Supreme Court in *Glickstein* v. *United States*, 222 U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911), and *United States* v. *Bryan*, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950), demonstrate that the Court has not hesitated to find or expand exceptions to the bar against the use of immunized testimony where the defendant has allegedly committed perjury or otherwise subverted the functioning of a tribunal. In *Glickstein*, the defendant was convicted of giving perjurious statements after having been granted immunity under a statute which provided, without exception, that no testimony given under a grant of immunity could be offered in evidence against the witness in any criminal proceeding. The Court affirmed the conviction, concluding a grant of immunity "does not endow the person who testifies with a license to commit perjury," and perhaps more fundamentally, "the immunity afforded by the constitutional guarantee relates to the past." 222 U.S. at 142, 32 S.Ct. at 73. Similarly, in *Bryan*, the Court found that a witness who had been automatically granted use immunity under another statute could be prosecuted for contempt of Congress notwithstanding that the statute in question provided an express exception to subsequent prosecution

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[9] Although § 6002 proscribes the use of immunized testimony in criminal prosecutions rather than proscribing the prosecution itself, where, as here, the testimony itself is the *corpus delecti* of the charged offense, proscribing the use of the testimony would necessarily require dismissal of the indictment.

only for perjury. The Court again based its holding on the purpose of the immunity statute and on the fact that the protections afforded by such a statute are intended to apply only to past criminal acts. 339 U.S. at 340, 70 S.Ct. at 735.

The case at bar presents no unique circumstances justifying a departure from the principles set forth in *Glickstein* and *Bryan*. Nor has the Court found any language in *Apfelbaum* which indicates the continuing vitality of the rationale expressed in those earlier cases is now in doubt.[10] Aside from the Supreme Court's apparent decision that the listing of exceptions in immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration, *see United States* v. *Tramunti*, 500 F.2d at 1345, the fact remains that a grant of use immunity does not immunize the witness from prosecution for an act committed subsequent to the granting of the immunity. Here, the alleged obstruction of justice, if it occurred at all, had to have taken place following the Court's granting defendant immunity under § 6002. It is, therefore, apparent the grant of immunity does not operate to bar the use of the immunized testimony against defendant on the obstruction of justice counts of the indictment. Accordingly, defendant's motion to dismiss on this basis must be denied.

The conclusions set forth above notwithstanding, the Court remains concerned as to the close interrelationship between

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[10] The statement in *Apfelbaum* perhaps most relevant to the instant inquiry reads:

> The legislative history of § 6002 shows that Congress intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible.

445 U.S. at 122, 100 S.Ct. at 952. The import of this statement is not entirely clear, however, as Justice Rehnquist concluded the opinion by stating

> The exception of a perjury prosecution from the prohibition against the use of immunized testimony may be a narrow one, but it is also a complete one.

Id. at 131-32, 100 S.Ct. at 957.

the elements of "materiality" on the false decalrations charge and "impeding the administration of justice" on the obstruction of justice charge. Although the cases indicate a distinction exists between the two, *cf. United States* v. *Kelly*, 540 F.2d 990, 993 (9th Cir. 1975) (setting forth materiality standard), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 738, 50 L.Ed.2d 751 (1977), the realities of the situation suggest such a distinction may be more seeming than real. To the extent this is true, it appears to the Court a problem of "double punishment" might be presented. Though the court will not embark upon an elaborate discussion of that issue here, the parties should be prepared to address it when and if it becomes appropriate.

III. *Motion For Bill Of Particulars*

For the reasons stated from the bench at the hearing on November 22, 1982, the government will not be required to produce a bill of particulars beyond that already supplied, and defendant's motion in this regard will, accordingly, be denied.

IV. *Motion To Dismiss The Indictment On The Ground Of Insufficiency*

In accordance with the Court's comments at the hearing on November 22, the issues raised by defendant in support of this motion are more properly to be resolved upon the taking of evidence at trial. Accordingly, the Court will issue no final ruling on this motion at this time.

An appropriate order will issue.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case No. CR 82-00087-01-R

UNITED STATES OF AMERICA
v.
FERN A. CARON

FILED
JAN 25 1983
CLERK, U.S. DIST. COURT RICHMOND, VA.

FINDINGS OF FACT FROM THE BENCH

I have no doubt of the guilt of the defendant as to each of the charges.

Count 1 and Count 2 charge the defendant with violating 18 U.S.C. Section 1823, that is, with making a false declaration before a Grand Jury.

In Count 1, the Court finds from the evidence that the material matters to which the Grand Jury was addressing itself dealt with whether there had been acts of commercial bribery, and the use of false and fraudulent credit documents by former officers and executives of Hartz Mountain in the years 1977 and 1978, and in particular, whether there had been payments of cash rebates and commercial bribes from Hartz to Mr. Frank Palecko who in turn allegedly disbursed those payments to customers of Hartz Mountain.

Now, this whole matter originally commenced by virtue of an antitrust suit filed in this Court. I want to be very careful that that fact doesn't influence me when the time comes for sentencing. I think perjury is the most horrendous offense of all the white-collar crimes. I know of none worse than perjury.

It is the one crime that can really erode a system where people work, and work their hearts out, in an effort to see that justice is done, and then to have somebody come in and just use it and lie, and it happens every day, I am afraid, is in my view a terrible offense.

As I have noted, there was a civil suit in this Court that obviously was the genesis of this whole matter. Apparently, during that civil suit, allegations of perjury and violations of the antitrust act arose, and ultimately it got to the U.S. Attorney's Office and they found that there had been, what they believed to be false statements to the FTC prior thereto, and they were investigating that as well as other matters.

Now, in dealing with Count 1, which for lack of a better phrase I will call the Palecko matter, Mr. Caron who had prior thereto been granted immunity by this Court and had given a statement under oath to the U.S. Attorney's Office, was then taken before the Grand Jury and asked questions directly connected with Mr. Palecko which, had they been answered honestly and fully, would have led to further inquiry. Leads to further inquiry may, of course, be material to an investigation.

The test of materiality is whether the false testimony has the natural effect and tendency to impede, influence, or dissuade the Grand Jury from pursuing its investigation. Fairness dictates that I say that I don't think that it stopped the Grand Jury from any further investigation, but it certainly impeded the investigation for, had they gotten truthful answers, they would have continued questioning Mr. Caron, in an effort to reach the target of their investigation, on whom their real target was, the officials of Hartz and Mr. Leonard Stern in particular.

Now, let me go to the questions that were asked, the ones that I find Mr. Caron answered untruthfully.

He was asked, "How much contact did you have with Frank Palecko?"

"Next to none" was his answer.

The Court finds that he had telephonic contact with Mr. Palecko at least six or eight times in reference to Mr. Palecko's tax problems at a time that Mr. Palecko was under indictment for tax evasion.

Question: "Did you hear anything about any income tax problems that Palecko had or indictment for income tax evasion?" The answer: "I heard a conversation in the office, it was not directed to me, that Frank Palecko had been indicted for tax evasion. At that time I didn't even know who Frank Palecko was. It was of no consequence."

Now, that response may well have been true, depending on the time element that was being addressed. It certainly wasn't the whole truth.

"Question: You had no conversation with him concerning criminal charges for income tax evasion?"

"Answer: No, sir."

No equivocation there, and the Court finds that that was a deliberate, willful, knowing lie. There is no clearer way to describe that response.

"Question: Did anyone indicate to you that the income tax charges against Palecko had anything to do with Palecko's business relationship with Hartz Mountain?"

"Answer: I knew nothing about his tax charges, sir."

That, too, was wrong, and willful, and knowing. He did know of them. He had conversation with Mr. Palecko in which Mr. Palecko attempted to negotiate, and I think, with somebody else in the Hartz company, too, to the end that Palecko would get $300,000, I believe, to take care of his tax problems, and have the matters straightened out, legal fees and so forth.

The Court finds from the evidence that not only did Mr. Caron know about Mr. Palecko's tax problems, but that he discussed them with Mr. Stern, as well with Mr. Palecko. The Court accepts Mr. Palecko's testimony as being truthful.

"Question: So nobody told you he was being charged with income tax evasion because of some transactions that he had with Hartz?"

"Answer: No, sir."

That, in the Court's view, was wrong, deliberate, and willful.

"You just didn't have any knowledge of that?"

"Answer: The only knowledge that I have was that he had been indicted for tax evasion and not elaborated upon." That response was false and Mr. Caron made it deliberately, willfully and with intent to mislead.

"Question: With respect to the income tax situation that you heard about, do you have any other information concerning what you gave us yesterday?"

"Answer: No, sir. The only thing I know about that is what I stated yesterday."

That was not true. The Court finds that it was not true.

As a matter of fact, the Court finds that there were discussions of meetings between Mr. Palecko and Mr. Stern, where Mr. Caron was present, in which he, Mr. Palecko, was told if he would plead guilty, in effect protect the company, he would be taken care of. I have no problem with the materiality of that or the fact that it was violative of Section 623.

Now, I want to add one other thing to my finding in reference to Mr. Palecko. I think the government knew of the telephone conversations between Mr. Palecko and Mr. Caron. I think they had a tape. I am not sure that the Grand Jury had the benefit of that tape, or that the Assistant United States Attorney at the time he was conducting the investigation had the benefit of the tape when he questioned Mr. Caron, but he certainly knew the gist of what it contained.

I find there was no obligation on him to have advised Mr. Caron of that. It would be different if Mr. Caron was brought in

"cold turkey," so to speak, but here is a man that already had been given immunity. In my view, that just compounded the whole situation by taking advantage of the immunity, to go in and lie. I don't think there was any duty on the government to give him any further warnings. He had been thoroughly warned.

While he was, at that time, no longer an employee of Hartz, the Court does find that when he left Hartz he was paid, continued to receive a salary which I believe was $60,000 for two years. I have no doubt he was trying to protect Hartz, and perhaps himself.

Count 2 dealt with the Grand Jury's investigation as to whether officers and executives of Hartz Mountain had endeavored to obstruct justice, or had committed perjury, suborned perjury, conspired to commit these offenses by knowingly and willfully testifying falsely in depositions, and suborning and procuring such false testimony in a lawsuit filed in this Court that I heretofore made reference to. And, in that connection, the government targeted in on Hartz Company dealings with prostitutes.

Now, he was asked the question, "What was your involvement in arranging for prostitutes to be there for buyers?", meaning a show they have every January in Chicago.

His answer was, "None."

That was wrong, deliberate, willful, a lie. He was involved in it. The Court finds that not unlike football coaches look for talented athletes, apparently Caron sent a scout out to interview at least one prostitute to see if she met appropriate standards, I assume, of what certain Hartz customers apparently had come to expect. I deem that to be making arrangements, and Mr. Caron lied as to his involvement.

I accept Mr. Jenkins' testimony, which is corroborated by other witnesses, that in connection with a show in 1975, Mr. Caron sent Mr. Jenkins, who was a Los Angeles district manager of Hartz, to interview this prostitute and report back to

him, to see if she would be suitable to meet Hartz customers who went to these annual trade shows and utilized these prostitutes.

So that, too, was deliberately untruthful.

The next questions, "You never assisted in obtaining prostitutes to fly out to Chicago?"

Answer: "No, sir."

The Court finds from all of the circumstances that that too was untruthful. He may not have personally bought the airline ticket but the Court finds he told at least one witness that somebody else was going to get the tickets for the prostitutes.

He was further asked: "You don't know anybody from California named Sheila?"

"Answer: I know the name from Chicago."

Well, that was not a direct falsehood, but it was not the whole truth. He obviously knew of her from California, or that she was associated with California, and he gave Mr. Jenkins the instructions to contact Sheila in California in reference to getting somebody else to assist her in her chores as a prostitute at the show.

"Question: You never lined up any girls for the show?"

"Answer: No, sir."

That was not the full truth.

"What were the girls paid?"

"I don't know, sir."

Well, I think that is a half-truth. The evidence is that they were paid by Hartz people who would then send in vouchers that Mr. Caron would approve, and he may not have paid that much attention to it, so I can't say that that was an out-and-out deliberate falsehood.

"Do you know whether they were paid a flat fee or paid per trick?"

"I don't know."

"You had nothing to do with that?"

"No."

Well, the Court finds that that is not the entire truth, because he knew that he had $2,000 cash of Hartz' money that was to be delivered for the use of the prostitutes.

"Question: Who did arrange for the prostitutes for Hartz to entertain buyers?"

"Answer: I don't know. They were there prior to my being in corporate Hartz, and they were there every January I went to a show."

I think that is probably partially factual, from the description given of this company, prostitutes were used at yearly trade shows to entertain customers.

When asked how they got there and who arranged for them, Mr. Caron responded, "I don't know."

I think that was a falsehood. The evidence shows that Mr. Caron was right in the middle of the arrangements of that sort of entertainment.

"Who arranged it at Hartz to pay the prostitutes?"

"I don't know."

Well, the evidence before the Court is that Mr. Caron received $2,000 from Mr. Stern for the purpose of conveying that money for payment to prostitutes.

Now, he was asked, "Isn't it also true there was cash carried from Harrison, New Jersey, to pay the prostitutes at the show?"

"Not to my knowledge."

That could well be true, for he had left the company by that time and had turned the money over to another employee. Then he was asked, "You had nothing to do either with obtaining the money to pay them or arranging for them to be there?"

"Answer: Absolutely not."

That was false, deliberately and willfully false. And the Court finds it was material to the investigation.

Now, Counts 3 and 4 charge the defendant with violating Section 1503, that is, with obstructing the administration of justice by willfully testifying falsely. In one of the counts, he is charged with willfully testifying falsely before the Grand Jury to the effect that he never had any conversations with one Frank A. Palecko, Sr., concerning income tax evasion. I think his false testimony obstructed and impeded the duties and responsibilities of the Grand Jury. I find him guilty of that offense.

The same situation exists in the other count in that, by virtue of his false testimony concerning the prostitution matter, he impeded the Grand Jury in its investigation, and the Court finds him guilty of that.

Now as to further findings—and I will take each of the witnesses so I don't think there is no doubt about the Court's conclusions—some of the witnesses were not of the highest type persons, indeed some were admitted perjurers, who made plea agreements with the government. Nevertheless, if it were simply their testimony alone, the Court would have a more difficult time, but it wasn't just their testimony. It is the Court's reading of the entire transcript of the proceedings wherein Mr. Caron testified before the Grand Jury. It was the totality of the circumstances surrounding this sordid matter. The Court did believe Mr. Albuquerque in reference to the transaction wherein he was sent by Mr. Stern to pick up the $2,000 from Mr. Caron, which Stern had given Caron in reference to the prostitutes.

And, further, I believe that Mr. Caron stated that he had made arrangement for a young lady to come from California in reference to handling the job at the show as a hostess—in reality a prostitute.

I also believe that during a trip in 1979, Mr. Caron, in the presence of Messrs. Luxenberg and Spencer, Mr. Caron made

reference to the fact that the $2,000 he had given to Mr. Albuquerque to return to Mr. Stern had come from Mr. Stern for purposes of paying for the prostitutes.

In reference to the testimony concerning purging of Hartz files, I don't think there is any evidence Mr. Caron told anybody to purge files. I do hope, however, that there is a further investigation going on in reference to that matter. It is a serious matter allegedly involving a member of the Bar.

The evidence is, and the Court makes no finding in this regard, that an attorney told people to purge files in a case in this Court. And I would like to get a report on that when it is concluded, Mr. Williams.

MR. CACHERIS: Not talking about these lawyers, are you?

THE COURT: Sir?

MR. CACHERIS: Not talking about these lawyers?

THE COURT: No, of course, not, and I earnestly hope it was simply a misunderstanding, but it is serious.

MR. WILLIAMS: I will, Your Honor.

THE COURT: Now, there wasn't any shaking of Mr. Albuquerque's testimony. As a matter of fact, he wasn't even questioned on his direct testimony—I am not critical of the cross examination—but it really went to the fact that he had at a prior time committed perjury—which he admitted. That doesn't mean that he perjured himself here. I don't think he did in this Court yesterday. Mr. Spencer, a gentleman who did not know Mr. Caron until Caron had left Hartz, had been, admittedly, anything but the epitome of truthfulness in the past. He gave himself a B.A. degree from Bridgeport after three months there, or four months. He lied in depositions. But he did overhear the conversations that Mr. Albuquerque testified to in reference to the money for the prostitutes.

If I had just Mr. Spencer's testimony along, I would not have accepted it, I must tell you, but it was not standing alone—it was corroborated.

And I accept as factual Mr. Norman's testimony. Mr. Norman's credibility, in my view, is beyond question.

I believe I have commented on Mr. Jenkins. I accepted Mr. Jenkins' testimony.

Mr. Palecko also impressed me very much. He testified that over a period of three years, he passed about $30,000 that he had received from Hartz officials. I think one of them was Mr. Caron's predecessor, and a man by the name of Rose Bishop, and got credit memos on it, and then was indicted on tax charges in '73, and was tried in late '73 and acquitted. Mr. Palecko discussed the tax problem a number of times with Mr. Caron, both after and prior to the indictment. Palecko wanted to protect the corporation and he suggested that, if he pleaded guilty to avoid a trial he should be compensated or reimbursed for his expenses. He had at least one meeting with Mr. Stern, where Mr. Caron was present.

Now, Mr. Palecko had taped conversations. I don't know what is in those conversations, because I did not admit the tapes. But I specifically find from his testimony that he discussed a figure of $300,000 with Mr. Caron as a way of cleaning up the tax situation.

So I think that Mr. Caron impeded the Grand Jury's investigation both as to whether perjury had been committed before the FTC and whether perjury had been committed in this Court in connection with discovery matters.

All right, sir. If you will stand up, please, Mr. Fern Caron.

The Court finds you guilty as charged in Count 1, Count 2, Count 3 and Count 4.

You may be seated, sir.

I want to get a presentence report, of course, Mr. Cacheris.

The bond that I set to some extent will be dependent on whether you really are sincere about appealing, and I would suggest that this is the time to order the transcript, because, as

you know, I will be in Puerto Rico, and while my court reporter has plenty of things to do, he will have more when I get back.

MR. CACHERIS: I am very sincere about the appeal.

THE COURT: Good.

MR. CACHERIS: I believe the transcript has already been ordered so that—

THE COURT: I see no rush, then, in the sentencing unless you do.

MR. CACHERIS: Yes.

THE COURT: Why don't we do it. I will be back for one day in January, but I think we could make it sometime in February. You know I will grant him bond to stay out for appeal.

MR. CACHERIS: I thought you would, Your Honor.

THE COURT: I always do.

MR. CACHERIS: We have a logistics problem. He lives in California. I think—

THE COURT: I will try to accommodate you, though I can't go to California to do it.

MR. CACHERIS: Well, I will go with you. But if they are going to do a presentence report, it will have to be referred from here to California and back. It is not a local investigation.

THE COURT: Yes. Mrs. Smith, do you have the case?

MRS. SMITH: No, sir. Mr. Rockhold's case.

THE COURT: How about Thursday, the 24th of February? That should give them a little over two months to get it. Does that suit your docket, Mr. Cacheris?

MR. CACHERIS: I think so, Your Honor.

THE COURT: I will do it another day.

MR. CACHERIS: As far as I know, that is clear.

THE COURT: 9:45.

Mr. Caron, we will continue you on the same bond that you are under now for appearance here at 9:45 a.m., Thursday, February 24, 1983, for sentencing. Before you leave the building, please report to the probation office.

December 21, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5056

UNITED STATES OF AMERICA,

Appellee,

versus

FERN CARON,

Appellant.

UNPUBLISHED

Appeal From The United States District Court For The Eastern District Of Virginia, At Richmond. Robert R. Merhige, Jr., District Judge. CR 82-00087-R

Argued October 7, 1983 Decided November 10, 1983

Before RUSSELL and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Plato Cacheris (Larry S. Gondelman, Hundley & Cacheris, P.C. on brief) for Appellant; Justin W. Williams, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant was convicted on two counts of perjury for testimony he gave before a grand jury and two related counts of obstruction of justice based upon the false testimony. He has appealed presenting a number of contentions, none of which requires reversal.

I.

During the course of a civil anti-trust case against Hartz Mountain Corporation, it appeared that some officials and employees of Hartz had perjured themselves and had destroyed relevant documents. This led to a grand jury investigation, the focus of which was to determine whether Stern, the president of Hartz, and other Hartz top officials, had engaged in commercial bribery.

The defendant, who had been a corporate vice-president of Hartz from sometime in 1972 until January 9, 1976, was called as a witness before that grand jury. He declined to testify on Fifth Amendment grounds, but was granted immunity except for perjury that might be committed during his testimony. It was explained to him that the perjury exception included charges of obstruction of justice that might arise out of false testimony.

Caron was questioned about the use by Hartz of prostitutes in connection with the annual housewares sale show in Chicago. He testified that he knew that prostitutes were there, that they had been there before he became a corporate official, and that he had approved expense vouchers in which Hartz employees claimed reimbursement for moneys paid to prostitutes. He denied, however, any involvement in arranging for the presence of the prostitutes or any knowledge of compensation to the prostitutes in cash taken to Chicago from corporate headquarters in New Jersey.

At the defendant's trial there was testimony that he was rather extensively involved in the selection and compensation of the prostitutes. For the 1975 show, he directed the engagement of a California prostitute named Sheila, who had worked for Hartz before, and directed a West Coast Hartz representative to interview one of Sheila's friends to determine her suitability for the corporation's purposes. There was also testimony that on January 9, 1976, the date upon which he was discharged, he had in his possession $2,000 in cash which had been given to him by Stern for the purpose of taking the money to

Chicago for payment to the prostitutes. At the direction of Stern, another corporate official repossessed the cash and returned it to Stern.

One of Hartz's distributors named Palecko had been used as a conduit through which discounts were granted to buyers. Palecko was reimbursed for his expenditures in that connection by credit memoranda, which resulted in his indictment for income tax evasion.

Before the grand jury, the defendant testified that he had heard that Palecko had been indicted for income tax evasion, but he testified that he knew nothing else about it and had not talked to Palecko about it.

At the defendant's trial there was testimony that Palecko had had a number of conversations with Caron about the income tax evasion charges and one with Stern during which Caron was present. According to that testimony Stern attempted to persuade Palecko to enter a plea of guilty without revealing Palecko's distribution of funds to merchants buying Hartz products with the promise that Hartz would fully reimburse him for his fines and expenses. No such arrangement was consummated because Palecko was demanding $300,000 for his trouble and expenses and that was more than Stern was willing to promise.

It developed that Palecko had secretly taped several of his telephone conversations with Caron about the income tax evasion charges and had delivered those tapes to an FBI agent.

II.

After the trial to a court sitting without a jury, the district judge found the defendant guilty. To the extent that Caron's grand jury testimony was inconsistent with other testimony submitted at the trial, the district judge found that the defendant's relevant answers were intentionally and knowingly false. He found them material to the grand jury's inquiry, for they tended to shield Stern and other top corporate officials from commercial bribery charges. He also found the false answers

were intended to divert and obstruct the grand jury's inquiry about the involvement of Stern and other top corporate officials.

III.

The defendant first contends that no offense was committed, because the grand jury before which Caron appeared as a witness was improperly constituted under the Jury Selection and Service Act of 1968 as was held in *United States* v. *Branscome*, 529 F. Supp. 556 (E.D. Va.), affirmed, 682 F.2d 484 (4th Cir. 1982). That contention had been raised by a motion to dismiss the indictment, a motion which was denied by the district court in a published memorandum. *United States* v. *Caron*, 551 F. Supp. 662 (E.D. Va. 1982). We find the contention unavailing for the reasons stated by the district judge.

IV.

On appeal, the defendant also contends that the grant of immunity bars subsequent prosecution for obstruction of justice based upon false testimony, that the findings of fact and the evidence were insufficient to support any finding of guilt on any of the four counts, and that the false testimony was not material to the grand jury's investigation.

We have fully considered these contentions, but find no merit in either of them.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5056

UNITED STATES OF AMERICA

Appellee,

v.

FERN CARON

Appellant.

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Russell and Judge Ervin,

IT IS ORDERED that the petition be, and it is hereby, denied.

United States Circuit Judge

December 7, 1983

FILED
DEC 7 1983
U.S. Court of Appeals
Fourth Circuit

APPENDIX E

18 U.S.C. § 1503 provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1623 provides:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. § 6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

28 U.S.C. § 1861 provides:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1867 provides:

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand jury or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting a grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has

been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.